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Meeting: 1419th meeting (December 2021) (DH)

Communication from an NGO (Life Memory Freedom Association) (17/11/2021) in the GURBAN group of cases v. Turkey (Application No. 4947/04).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Communication d'une ONG (Life Memory Freedom Association) (17/11/2021) relative au groupe d'affaires GURBAN c. Turquie (requête n° 4947/04) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



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COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by Life Memory Freedom Association

**in Gurban v. Turkey
(Application no. 4947/04) and
3 Repetitive Cases**

Introduction

1. The present Rule 9.2 submission concerns general measures and updated information concerning the following cases: Gurban v. Turkey (Application no. 4947/04), Boltan v. Turkey (Application no 33056/16), Kaytan v. Turkey (Application no.27422/05), Ocalan v. Turkey (no 2)24069/03.

2. Life Memory Freedom Association [Yaşam Bellek Özgürlük Derneği] is a non-governmental organization working in the field of human rights. The Association made applications to the Constitutional Court and the European Court of Human Rights regarding restrictions to the freedom of expression. Among the members of the Association are lawyers who have experience in human rights cases and academics who are specialized in human rights law and other related legislation.¹

1. Case Description

3. The case concerns violation of the Convention on account of the absence of any review mechanism in Turkish legislation for the aggravated life sentence imposed on the applicant (Violation of Article 3). Accordingly, the legislation was characterized by the absence of any mechanism that would allow the review, after a certain minimum term, of a life sentence imposed for the crimes committed by the applicant in order to verify whether legitimate grounds still justified the continuation of his detention. The Court held that such an “irreducible” sentence amounted to inhuman treatment.

The Court further found a violation of the prohibition of inhuman or degrading treatment as regards the conditions of the applicant’s detention up to November 2009 on account of his social isolation (Violation of Article 3).

2. Comments on the Government’s Action Plan

¹ See the web page of the Association: <https://yasambellekozgurluk.org/>

4. Paragraphs 9, 10, 11 and 12 of the Government's opinion include information on the provisions regarding conditional release in the Law No. 5275 on the Execution of Penalties and Security Measures. As stated in paragraph 12 of the Government's opinion, it is still not possible to implement conditional release for those who have been sentenced to aggravated life imprisonment for committing certain crimes. Actually, in the Article 107 of the Law No. 5275, it is stated that "... (16) In case of being sentenced to aggravated life imprisonment due to crimes within the framework of a criminal organization in the Second Book of the Turkish Penal Code No. 5237, Part Four, Chapter Four titled 'Crimes against the Security of the State', Chapter Five titled 'Crimes against the Constitutional Order and Its Functioning', Chapter Six titled 'Crimes against National Defense', the provisions of conditional release shall not be applied." The legal regulation and practice regarding the punishment of life imprisonment without the possibility of conditional release, which is the subject of the Gurban cases, continues to exist.

5. The Government argued in paragraph 13 of their opinion that the practice of life imprisonment without conditional release existed in Italy, Hungary and Ukraine. Being sentenced to life imprisonment without the possibility of conditional release violates Article 3 of the European Convention on Human Rights, and it has been covered under a separate heading of the Guide on the case-law of the European Convention on Human Rights Prisoners' rights.ⁱ Italyⁱⁱ, Hungaryⁱⁱⁱ and Ukraine^{iv} have violated Article 3 of the European Convention on Human Rights due to their implementation of life sentences without the possibility of conditional release. In addition, the European Court of Human Rights rendered violation judgments against the United Kingdom^v, Bulgaria^{vi}, Netherlands^{vii} and Lithuania^{viii} for similar reasons.

6. In paragraph 14 of the Government's opinion, it is stated that there are applications before the Constitutional Court regarding the issue. On the website of the Constitutional Court, there is a decision regarding one application filed for being sentenced to life imprisonment without any hope of release.^{ix} In this decision, it is stated that "...1. [t]he application is on the allegation that being sentenced to imprisonment until death without hope of release violates the prohibition of punishment incompatible with human dignity, and the legality principle of crimes and punishments due to the negative implementation of the execution regime. ... 29. In the concrete case, although the applicant referred to the legislative provision that regulates the abolition of the death penalty and not allowing the possibility of conditional release for sentences commuted from the death penalty, the result of the application was life imprisonment, with the decision of the Diyarbakır State Security Court No. 2, dated December 16th, 1997. It is understood that the applicant's situation was not included in the provisions of the legislation regarding the abolition of the death penalty. 30. In addition, at least two legal status summaries for the applicant's release on merit and conditional release were determined. The applicant has not submitted a legal status summary stating that he has not benefited from the conditional release provisions pursuant to any legal provision. 31. It has been concluded that the applicant could not reveal that he was personally and directly affected by the legal regulations on the provisions of conditional release, which were claimed to be the reason of the violation, and that he was the victim of that violation. 32. For the reasons explained, it should be decided that this part of the application is inadmissible due to lack of authority in terms of the person, without examining it in terms of other admissibility conditions." As of November 3rd, 2021, 9293 individual application decisions were published on the website of the Constitutional Court since 2012, when the individual application remedy was accepted. Among these decisions, there is no decision made on the same issue as the Gurban case group. On the other hand, not all decisions of the Constitutional Court are

published, and no information or data is shared regarding the contents of the files pending before the Constitutional Court. Since the Constitutional Court did not have a decision that met the standards of the European Court of Human Rights in the nine-year period when the individual application started, it cannot be said that it is an effective domestic remedy regarding the Gurban case group.

7. Paragraphs 15 to 20 of the Government's opinion include information on the President's clemency of the sentences. It has been stated in various judgments of the European Court of Human Rights that the President's power to clemency sentences does not eliminate the problems related to the application of life imprisonment without conditional release. In paragraph 41 of Boltan Türkiye (33056/16) decision dated February 12th, 2019, European Court of Human Rights stated that "...As regards the issue of the The "Grâce" authority granted to the President raised by the Government, the Court recalls that it had previously found that discharge on humanitarian grounds was incompatible with the 'possibility of release' on a number of legitimate punitive grounds (above mentioned decisions on Vinter and others, § 129, on Öcalan (2), § 203, and on László Magyar/Hungary, No: 73593/10, §§ 55-58, May 20th, 2014). The Court sees no reason to change this case-law in the present case." Since 2019, there has been no change or improvement regarding the President's power to clemency of sentences. In a master's thesis accepted in 2020, many problematic issues related to the President's power to clemency were mentioned.^x

8. Paragraphs 21 to 24 of the Government's opinion include information on the general amnesty of the sentences by the Grand National Assembly of Turkey. It was stated in a judgment of the European Court of Human Rights that the power of the Grand National Assembly of Turkey to general amnesty sentences did not eliminate the problems related to the application of life imprisonment without conditional release. In paragraph 211 of its judgment on Öcalan v. Turkey (no 2)24069/03 dated March 18th, 2014, European Court of Human Rights states that "... [a]t the same time, it is a fact that the Turkish legislator enacts general amnesty or partial amnesty (in the latter, conditional release is applied after applying a certain security measure) in order to solve major social problems and at more or less regular intervals. However, it was neither claimed nor put forward before the Court that such a draft law that allowed the applicant to be released was being prepared. The court should rely on the law which sets out how aggravated life sentences are actually applied to inmates serving that sentence. The legislation does not require a reassessment of whether the legitimate grounds for [the person] to remain convicted after a certain minimum sentence still exist in the aggravated life sentence imposed for offenses such as the ones committed by the applicant." It is clear that the amnesty laws enacted by the Grand National Assembly of Turkey are not within this scope and do not meet the conditions of the European Court of Human Rights. With the Law on the Execution of Penalties and Security Measures No. 7242 dated April 14th, 2020, and the Law on Amendments to Some Laws^{xi}, many changes were made regarding the execution of sentences and many prisoners were released based on these changes. However, Article 107/16 of Law No. 5275 is not included.

9. According to the Judicial Statistics 2020^{xii} (Appendix 4); The Office of the Chief Public Prosecutor's Office opened 33,885 public cases related to Crimes Against the Constitutional Order and Its Operation, 33 public cases regarding Crimes Against National Defense. 57,979 people were tried in public cases related to Crimes Against the Constitutional Order and Its Operation, 966 of whom were under the age of eighteen. 46,783 people were sentenced, 128 people were tried in public cases related to Crimes Against National Defense, 16 people were sentenced. According to the Turkish Penal Code some types of these crimes (violate the

constitution, assassination and actual attack on the president, crime against the chamber, crime against government, armed revolt against the government of the Republic of Turkey, etc) are being punished with life imprisonment. No data on life imprisonment sentences were shared with the public. Due to the number of people who were tried and convicted, it can be said that serious problems with life imprisonment sentence without hope of release, which is the subject of the Gurban case group, will become more severe in the coming years. In this context, we estimate that thousands of applications can be made to European Court of Human Rights.

10. In paragraph 25 of the Government's opinion, it is stated that within the scope of the Öcalan Turkey case, no violation decision was made regarding the prison conditions of the applicant after 2009, and that no action was required. There is no information shared with the public regarding the applicant's current prison conditions. It is understood that the parliamentary questions on the issue submitted by the deputies to the Minister of Justice were also not answered.^{xiii}

3. General measures

11. Conditional release of persons sentenced to aggravated life imprisonment is not possible within the scope of paragraph 16 of Article 107 of the Law No. 5275. As long as this provision is not removed, the problems under the *Gurban* case group will continue. In addition, it should be taken into account that thousands of people who were prosecuted due to the failed coup attempt on July 15th, 2016 can apply within the same scope. No data on life imprisonment sentences were shared with the public but we estimate that thousands of people have been sentenced to life imprisonment, or are at risk of life imprisonment.

A legal regulation should be made that people who are sentenced to life imprisonment for all crimes without exception can benefit from conditional release. In this regulation, the conditions for conditional release should be subject to objective conditions and subject to judicial review.

12. The public should be informed about Abdullah Öcalan's prison conditions, and he should be provided with opportunities to meet with his lawyers and family members, as his legal rights entails.

4. Conclusion and recommendations

13. The problems dealt with in the Gurban group cases still continue. The problems are structural and also exist even at the level of the Constitutional Court. The continuity of the problems increases the possibility of adversely affecting the judicial activities in the future.

14. In conclusion, we respectfully request the Committee of Ministers to **continue supervision of this group of cases under enhanced supervision (given the length of time which passed since the judgment became final)**, and to call on the Turkish authorities to:

- Provide information about Abdullah Öcalan's prison conditions, and provide him with the opportunity to meet with his lawyers and family on a regular basis.

- To request statistical information from the Government of Turkey for the entire case group, asking for information including data showing “how many persons have been sentenced to aggravated life sentence in Turkey, how many persons have received this sentence by years, in which years the relevant judgments were finalized, and how many years persons sentenced to aggravated life imprisonment have been held in prison.”
- Amend Law No. 5275 and enact the possibility for persons who are sentenced to life imprisonment to benefit from conditional release, ensuring that conditions for conditional release be subject to objective conditions and to judicial review.

ⁱ Guide on the case-law of the European Convention on Human Rights Prisoners’ rights, published on August 31st, 2021, available at <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#>

ⁱⁱ In the aforementioned Guide, it is stated that “261. In *Marcello Viola v. Italy* (no. 2), 2019, §§ 103-138, the Court found a violation of Article 3 of the Convention. It considered that the sentence of life imprisonment imposed on the applicant under the relevant provision for mafia-related offences restricted his prospects of release and the possibility of review of his sentence to an excessive degree. In particular, access to the possibility of release on licence or other adjustments of sentence was contingent on the applicant’s “cooperation with the judicial authorities”. The Court had doubts as to the free nature of a prisoner’s choice to cooperate with the authorities and the appropriateness of equating a lack of cooperation with the prisoner’s dangerousness to society. In fact, the lack of “cooperation with the judicial authorities” gave rise to an irrebuttable presumption of dangerousness which deprived the applicant of any realistic prospect of release. It was thus impossible for the applicant to demonstrate that his detention was no longer justified on legitimate penological grounds: by continuing to equate a lack of cooperation with an irrebuttable presumption of dangerousness to society, the regime in place effectively assessed the person’s dangerousness by reference to the time when the offence had been committed, instead of taking account of the reintegration process and any progress the person had made since being convicted. This irrebuttable presumption effectively prevented the competent court from examining the application for release on licence and from ascertaining whether the person concerned had, in the course of his/her detention, changed and made progress towards rehabilitation to such an extent that his or her detention was no longer justified on penological grounds. The court’s involvement was limited to finding that the conditions of cooperation had not been met, and it could not assess the prisoner’s individual history and his or her progress towards rehabilitation. 262. In this case, the Court also indicated under Article 46 of the Convention that the State should undertake a reform of the life imprisonment regime, preferably by introducing legislation, in order to guarantee the possibility to review the sentence. This should allow the authorities to determine whether, in the course of his or her sentence, the prisoner had changed and made progress towards rehabilitation, to the extent that his or her detention was no longer justified on legitimate penological grounds, while enabling the convicted person to know what he or she had to do in order to be considered for release and what conditions were attached. The Court noted that the severing of ties with Mafia circles could be expressed in ways other than cooperation with the judicial authorities and the automatic mechanism provided for under the current legislation. Nevertheless, the Court specified that the possibility of applying for release did not necessarily prevent the authorities from rejecting the application if the person concerned continued to pose a danger to society.”

ⁱⁱⁱ In the aforementioned Guide, it is stated that “...253. In *László Magyar v. Hungary*, 2014, §§ 54-59 the Court held that there had been a violation of Article 3 of the Convention as regards the applicant’s life sentence without eligibility for parole. It was, in particular, not persuaded that Hungarian law allowed life prisoners to know what they had to do to be considered for release and under what conditions. In addition, the law did not guarantee a proper consideration of the changes in the life of prisoners and their progress towards rehabilitation. 254. In response to the *László Magyar* judgment, certain legislative changes were made, which the Court later examined in *T.P. and A.T. v. Hungary*, 2016, §§ 39-50. In particular, the Court found that making a prisoner wait forty years before he or she could expect to be considered for clemency for the first time was too long and that, in any case, there was a lack of sufficient safeguards in the remainder of the procedure provided by the new legislation. The Court was not therefore persuaded that, at the time of its judgment in the case, the applicants’

life sentences could be regarded as providing them with the prospect of release or a possibility of review and the legislation was not therefore compatible with Article 3 of the Convention.”

^{iv} In the aforementioned Guide, it is stated that “...260. In *Petukhov v. Ukraine* (no. 2), 2019, §§ 169-187 the Court held that there had been a violation of Article 3 of the Convention because the applicant had no prospect of release from or possibility of review of his life sentence. In particular, presidential clemency, the only procedure for mitigating life sentences in Ukraine, was not clearly formulated, nor did it have adequate procedural guarantees against abuse. Furthermore, the conditions of detention of life prisoners in Ukraine made it impossible for them to progress towards rehabilitation and for the authorities to therefore carry out a genuine review of their sentence.”

^v In the aforementioned Guide, it is stated that “...249. On the facts of the case in *Vinter and Others*, §§ 123-131, the Court found that there had been a violation of Article 3 of the Convention, finding that the requirements of that provision had not been met in relation to any of the three applicants. In the applicants’ case, the Court noted that domestic law concerning the power of the executive to release a person subject to a whole life order was unclear. In addition, at the relevant time, there was no review mechanism in place.”

^{vi} In the aforementioned Guide, it is stated that “...255. In *Harakchiev and Tolumov v. Bulgaria*, 2014, §§ 243-268, concerning the first applicant’s sentence of life imprisonment the Court found a violation of Article 3. It noted that from the time when the first applicant’s sentence had become final – November 2004 – to the beginning of 2012, his sentence of life imprisonment without commutation had amounted to inhuman and degrading treatment as he had neither had a real prospect of release nor a possibility of review of his life sentence, this being aggravated by the strict regime and conditions of his detention limiting his rehabilitation or self-reform. During that time, the presidential power of clemency that could have made the applicant’s sentence reducible and the way in which it was exercised was indeed opaque, lacking formal or even informal safeguards. Nor were there any concrete examples of a person serving a sentence of life imprisonment without commutation being able to obtain an adjustment of that sentence.”

^{vii} In the aforementioned Guide, it is stated that “258. In *Murray v. the Netherlands* [GC], 2016, §§ 113-127, the Court dealt with a complaint of a life prisoner who argued that, although a legal mechanism for reviewing life sentences had been introduced shortly after he lodged his application with the Court, *de facto*, he had no prospect of being released since he had never been provided with any psychiatric treatment and therefore the risk of his reoffending would continue to be considered too high to be eligible for release. The Court held that there had been a violation of Article 3 of the Convention. It underlined in particular that, under its case-law, States had a wide margin of appreciation in determining what measures were required in order to give a life prisoner the possibility of rehabilitating himself or herself. However, although the applicant had been assessed, prior to being sentenced to life imprisonment, as requiring treatment, no further assessments had been carried out of the kind of treatment that might be required and could be made available. Consequently, at the time he lodged his application with the Court, any request by him for a pardon was in practice incapable of leading to his release. Therefore, his life sentence had not *de facto* been reducible, as required by the Court’s case-law under Article 3 of the Convention.”

^{viii} In the aforementioned Guide, it is stated that “259. In *Matiošaitis and Others v. Lithuania*, 2017, §§ 157-183, the Court held that there had been a violation of Article 3 of the Convention in respect of six of the applicants, finding that, at the time of the judgment, the applicants’ life sentences could not be regarded as reducible for the purposes of Article 3. In particular, the Court stressed that commutation of life imprisonment because of terminal illness could not be considered a “prospect of release”. Likewise, amnesty could not be regarded as a measure giving life prisoners a prospect of mitigation of their sentence or release. The Court also did not consider presidential pardon as a mechanism ensuring that life sentences were reducible *de facto* for the following reasons: there was no duty to provide reasons for refusing a request for a pardon; pardon decrees were not subject to judicial review and could not be challenged by the prisoners directly; and the work of the relevant pardon commission was not transparent and its recommendations were not legally binding on the President. In addition, the Court found that prison conditions for life prisoners were not conducive to rehabilitation.”

^{ix} The decision of inadmissibility on Nesip Tarım’s individual application 2017/18634, the Constitutional Court, First Section, November 18th, 2020 (Appendix 1).

^x Kayaoğlu Demet, *Türk Hukukunda Devlet Başkanının Af Yetkisi* [Pardoning power of the president in Turkish law, MSc. Thesis, Erzincan 2020 (Appendix 2). In the Conclusion chapter of this study, it is stated

that “... [t]he President has the discretion to use the power to clemency in the presence of the reasons listed in the Constitution. The President does not have to state why he used or did not use his clemency. ... It is unclear who can apply for an amnesty so that the President can use her power to clemency. ... The clemency by the President is used in the presence of the reasons given in the Constitution, and the individuals who will benefit from it are designated individually . For this reason, it will be easier to identify the people who will deserve to benefit from it. However, it is unclear on what basis or how the reasons listed in the Constitution will be determined. ... The power to clemency of the President must be subject to judicial review.”

^{xi} The Law on the Execution of Penalties and Security Measures No. 7242 dated April 14th, 2020, and the Law on Amendments to Some Laws (Appendix 3)

^{xii} <https://adlisicil.adalet.gov.tr/Home/SayfaDetay/adli-istatistikler-2020-kitabi-yayimlanmistir22042021025204>

^{xiii} <https://m.bianet.org/bianet/insan-haklari/245673-hdp-ocalan-a-tecrit-ve-aclik-grevlerini-meclis-e-tasidi>

Appendices

1. The decision of inadmissibility on Nesip Tarım’s individual application 2017/18634, the Constitutional Court, First Section, November 18th, 2020.
2. Kayaoğlu Demet, Türk Hukukunda Devlet Başkanının Af Yetkisi [Pardoning power of the president in Turkish law, MSc. Thesis, Erzincan 2020.
3. The Law on the Execution of Penalties and Security Measures No. 7242 dated April 14th, 2020, and the Law on Amendments to Some Laws
4. Judicial Statistics, 2020